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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
10

11 UNITED STATES OF AMERICA,

CASE NOS. CR F 02-5285 REC AND CV F 08-1654 LJO

12
13 Plaintiff,

**ORDER ON DEFENDANT'S 28 U.S.C. § 2255
MOTION TO VACATE, SET ASIDE OR
CORRECT SENTENCE (Doc. 21)**

14 vs.

15 JESUS OCHOA BUENROSTRO,

16 Defendant.
17 _____/

INTRODUCTION

18 Defendant Jesus Ochoa Buenrostro ("Mr. Buenrostro") is a federal prisoner and proceeds pro se
19 to seek to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 ("section 2255").
20 Having considered Mr. Buenrostro's section 2255 motion on the record, this Court DENIES the motion.

21 **BACKGROUND**

22 **Charges And Plea Agreement**

23 An August 1, 2002 indictment charged Mr. Buenrostro with two counts--manufacturing
24 marijuana and possessing a firearm in furtherance of a drug trafficking crime.

25 Mr. Buenrostro entered into a January 21, 2003 Fed. R. Crim. P. 11(c)(1)(C) Memorandum of
26 Plea Agreement ("plea agreement") by which Mr. Buenrostro voluntarily agreed to plead guilty to Count
27 I of the indictment, violation of 21 U.S.C. § 841(a)(1)—manufacture of 1,000 or more marijuana plants.
28 The plea agreement provided Mr. Buenrostro's knowing and voluntary waiver of his constitutional and

1 statutory rights to appeal his plea and conviction. Mr. Buenrostro agreed to waive "his right to challenge
2 his conviction, sentence or the manner in which it was determined in any post-conviction attack,
3 including, but not limited to a motion brought under Title 28, United States Code, Sections 2241 or
4 2255."

5 Mr. Buenrostro acknowledged that he understood that "a sentencing guideline range for this case
6 will be determined by the Court pursuant to the Sentencing Reform Act of 1984" and that "the Court will
7 impose a sentence within the guideline range, unless the Court finds that there is a basis for departure."
8 The sixth page and seventh pages of the plea agreement address the potential sentence Mr. Buenrostro
9 faced, including the following:

10 COUNT ONE: (a) Imprisonment.

11 Mandatory minimum: Ten (10) years (unless the defendant meets the
12 requirements of 18 U.S.C. 3553(f),

13 which provides for a sentence of less than the mandatory minimum in limited
14 circumstances).

14 Maximum: Life imprisonment.

15 In addition, Mr. Buenrostro agreed, in pertinent part, to the following facts:

16 [O]n July 18, 2002, law enforcement located a trail alongside a drainage off
17 Wards Ferry Road on Bureau of Land Management property in Tuolumne County.
18 Human footprints were observed and followed to a campsite where defendant JESUS
OCHOA BUENROSTRO [sic] apprehended. He was sitting in the campsite which
contained a tent and food items with a loaded Ruger .22 caliber handgun next to him.

19 Adjacent to where defendant BUENROSTRO was located, law enforcement
20 located separate cultivation sites that contained a total of 3,510 marijuana plants. There
21 was PVC pipe throughout the cultivation sites. Defendant BUENROSTRO admitted he
was cultivating marijuana and he had the handgun to protect himself from animals.

22 **Acceptance of the Plea Agreement**

23 On January 21, 2003, the Court questioned Mr. Buenrostro about whether he understood the
24 terms of the plea agreement and whether he accepted those terms voluntarily. Regarding the potential
25 sentence imposed, the following exchange occurred:

26 THE COURT: Has anyone made any promises to get you to plead guilty other
27 than the agreement that you have with the United States
Attorney's office?

28 THE DEFENDANT: No.

THE COURT: Do you understand the Court is not bound by that agreement and

1 that if the Court should sentence you different than what's in that
2 agreement, or if the probation office should recommend
3 something different than what's in that agreement, you will not be
allowed to withdraw your plea of guilty. And with that in mind,
do you still wish to enter a plea of guilty?

THE DEFENDANT: Yes.

THE COURT:

Do you understand the Court can sentence you as I'm about to tell
you: **No matter what anybody else may have told you. As to
count-on Count One of the indictment. I must give you a
mandatory minimum of ten years unless you meet certain
requirements.** I can give you up to life imprisonment...With all
of that in mind and with those items that I have explained to you
that you've waived, do you still wish to enter a plea of guilty in
this matter? (emphasis added)

THE DEFENDANT: Yes.

Thereafter, the Court accepted Mr. Buenrostro's guilty plea and set a review of the probation pre-
sentence report and sentencing in this matter for a later date.

Objections to the Probation Report

Assistant Federal Defendant Robert W. Rainwater ("Mr. Rainwater"), as Mr. Buenrostro's
defense counsel, objected to the pre-sentence investigation report on April 7, 2003. Mr. Rainwater
objected to a suggested 2D1.1(b)(1) two-level enhancement for possession of a firearm and further
objected to the recommendation that Mr. Buenrostro was not entitled to the Safety Valve U.S.S.G. 5C1.2
(18 U.S.C. §3553(f)) ("Safety Valve"). Mr. Rainwater argued that because Mr. Buenrostro possessed
the gun for protection against animals, Mr. Buenrostro met his burden of proof, by a preponderance of
the evidence, that he did not possess the weapon in connection with the marijuana cultivation. Mr.
Rainwater concluded that no additional levels should be added to the base offense level, Mr. Buenrostro
was entitled to the Safety Valve, and, based on Mr. Buenrostro's criminal history, his guideline range
was 37-46 months.

In response, the Government, by and through Assistant United States Attorney Laurel J. Montoya
("Ms. Montoya") argued, *inter alia*, that Mr. Buenrostro was not entitled to the Safety Value, because
"[e]ven if the firearm was to be used solely as protection from animals, it still would be possessed in
connection with the offense as he would not be at the campsite in the wilderness but for his participation
in the cultivation of marijuana."

Sentencing

The Court conducted an April 14, 2003 sentencing hearing. Mr. Rainwater again objected to the

1 pre-sentence report and argued that the firearm was not used in connection with the offense and moved
2 for the Court to consider the Safety Valve. After considering the arguments, the Court ruled as follows:

3 THE COURT: [T]he Court is satisfied that there is sufficient [sic] to
4 show that the firearm was for the purpose of protection. It was a handgun. It certainly wasn't a hunting gun. It
5 was in possession of the defendant while out in the wilderness cultivating marijuana. So the Court would
6 find that the objection to the probation report should not be sustained.

7 Consistent with the plea agreement, this Court sentenced Mr. Buenrostro to the statutory minimum of
8 a term of 120 months (10 years) imprisonment and 60 months of supervised release upon release from
9 imprisonment. After Mr. Buenrostro was sentenced, and consistent with the plea agreement, the
10 Government moved to dismiss Count II of the Indictment. Mr. Buenrostro did not file a direct appeal
11 of his conviction and sentence with the Ninth Circuit Court of Appeals.

12 **Section 2255 Motion**

13 On October 27, 2008, Mr. Buenrostro filed his section 2255 motion. Mr. Buenrostro claims
14 that his plea not intelligent or voluntary because, at the time he entered his guilty plea, he understood
15 that he would receive 37 months of jail time and did not understand that he would receive the mandatory
16 minimum sentence of 10 years imprisonment. In his motion, Mr. Buenrostro acknowledges that his
17 motion is untimely, but argues that this Court should nevertheless consider his motion because it was
18 "filed as soon as [he] was able to receive and understand [his] plea agreement."

19 **DISCUSSION**

20 This Court finds three independent bases for dismissal of Mr. Buenrostro's section 2255 motion,
21 as discussed more fully below. First, Mr. Buenrostro's voluntary and intelligent plea may not be
22 attacked collaterally. Second, Mr. Buenrostro waived his right to attack collaterally his sentence with
23 a section 2255 motion. Third, Mr. Buenrostro's motion is untimely. For each of these reasons, "it
24 plainly appears from the face of the motion...that the movant is not entitled to relief." *U.S. v. Matthews*,
25 833 F.2d 161, 164 (9th Cir. 1987). Accordingly, this Court "*must* dismiss" Mr. Buenrostro's section
26 2255 motion. *Id.* (emphasis in original).

27 **Voluntary and Intelligent Plea**

28 "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who

has been advised by competent counsel, may not be collaterally attacked.” *Mabry v. Johnson*, 467 U.S. 504, 508-09 (1984). To determine voluntariness, the Court examines the totality of the circumstances. *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986). A plea is voluntary if it “represents a voluntary and intelligent choice among alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). “[A] plea of guilty entered by one fully aware of the direct consequences...must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).” *Brady v. United States*, 397 U.S. 742, 755 (1970). In sum, “a guilty plea is void if it was ‘induced by promises or threats which deprive it of the character of a voluntary act.’” *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995) (quoting *Machibroda v. United States*, 368 U.S. 487, 493 (1962)).

Here, Mr. Buenrostro acknowledged that he was fully aware of the direct consequence of his plea, in both written and oral form. In the written plea agreement, Mr. Buenrostro acknowledged and agreed that the statutory minimum of imprisonment was 10 years, unless he met certain requirements. At the time of the oral plea, Mr. Buenrostro stated under oath that he was entering into the plea of guilty voluntarily, that he was satisfied with his attorney’s representation, and that no one had forced him or threatened him to plead guilty. He stated that he understood that the minimum sentence for his offense was 10 years imprisonment and that sentencing was at the discretion of the Court. Thus, under *Brady*, Mr. Buenrostro’s plea must stand, as his plea was voluntary and intelligent.

Waiver

Mr. Buenrostro’s waiver to attack collaterally his sentence with a section 2255 motion precludes Mr. Buenrostro’s claims, if any, related to his sentence. A plea agreement is a contract and subject to contract law standards. *United States v. Escamilla*, 975 F.2d 568, 571 (9th Cir. 1992); *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985). A defendant may waive the right to bring a section 2255 motion. *United States v. Abarca*, 985 F.2d 1012, 1013 (9th Cir.), *cert. denied*, 508 U.S. 979 (1993). “[A] prisoner may not collaterally attack a judgment if the prisoner waived the right to do so.” *United States v. Racich*, 35 F.Supp.2d 1206, 1210 (S.D. Cal. 1999). A plea agreement does not waive the right to bring a section 2255 motion unless it does so expressly. *United States v. Pruitt*, 32 F.3d 431, 433 (9th

1 Cir. 1994). The right to bring a collateral attack under section 2255 is statutory, and a “knowing and
2 voluntary waiver of a statutory right is enforceable.” *Abarca*, 985 F.2d at 1014.

3 Mr. Buenrostro’s waiver of his appellate and collateral attack rights, as part of Mr. Buenrostro’s
4 knowing and voluntary plea agreement, is valid. When reviewing his plea in open court, Mr. Buenrostro
5 affirmed his desire to be bound by the terms of the plea agreement. Because Mr. Buenrostro waived his
6 right to attack collaterally his sentence in a section 2255 motion, Mr. Buenrostro is precluded to raise
7 such issues in this section 2255 motion which do not relate to the performance of his attorney or
8 voluntariness of waiver. *See Abarca*, 985 F.2d at 1013.

9 Statute of Limitations

10 Mr. Buenrostro’s motion is untimely. The Antiterrorism and Effective Death Penalty Act of
11 1996, Pub. L. No. 104-132, 110 Stat. 124, imposed a one-year statute of limitations period on a federal
12 prisoner’s collateral attack on his or her federal sentence. *Johnson v. United States*, 544 U.S. 295, 299
13 (2005). The applicable statute of limitations is embodied in 28 U.S.C. § 2255(f), which reads:

14 A 1-year period of limitation shall apply to a motion under this section. The limitation
15 period shall run from the latest of–

- 16 (1) the date on which the judgment of conviction becomes final;
- 17 (2) the date on which the impediment to making a motion created by
18 governmental action in violation of the Constitution or laws of the United States is
19 removed, if the movant was prevented from making a motion by such governmental
20 action;
- 21 (3) the date on which the right asserted was initially recognized by the Supreme
22 Court, if that right has been newly recognized by the Supreme Court and made
23 retroactively applicable to cases on collateral review; or
- 24 (4) the date on which the facts supporting the claim or claims presented could
25 have been discovered through the exercise of due diligence.

26 “Applied in the context of a criminal prosecution, finality is normally defined by the imposition of the
27 sentence.” *U.S. v. LaFromboise*, 427 F.3d 680, 683 (9th Cir. 2005) (quoting *Flynt v. Ohio*, 451 U.S. 619,
28 620 (1981)); *see also, Teague v. Lane*, 489 U.S. 288, 314 n.2 (1989) (“[A] criminal judgment necessarily
includes the sentence imposed upon the defendant.”). As Mr. Buenrostro’s sentence was imposed over
three years ago, Mr. Buenrostro’s claim is barred by the statute of limitations.

Moreover, Mr. Buenrostro provides no basis for equitable tolling. Equitable tolling is
unavailable only when “extraordinary circumstances beyond a prisoner’s control make it impossible to
file the petition on time.” *Stillman v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003). Accordingly, Mr.

1 Buenrostro's motion is dismissed on this independent basis.

2 **Certificate Of Appealability**

3 28 U.S.C. § 2253(c)(1) precludes an appeal from a final order in section 2255 proceedings unless
4 a circuit justice or judge issues a certificate of appealability ("COA"). A COA may issue "only if the
5 applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2);
6 *see Williams v. Calderon*, 83 F. 3d 281, 286 (9th Cir. 1996). A COA issues when defendant
7 demonstrates the questions raised are "debatable among jurists of reason; that a court could resolve the
8 issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed
9 further." *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4 (1983). In the absence of a COA, no appeal in a
10 section 2255 proceeding may be heard. 28 U.S.C. § 2253(c).

11 This Court has reviewed the record of this case and finds no jurist of reason could debate the
12 correctness to deny defendant collateral relief. *See Clark v. Lewis*, 1 F. 3d 814, 819 (9th Cir. 1993). On
13 the merits of this case, reasonable jurists would not debate the constitutionality of Mr. Buenrostro's
14 conviction. Accordingly, a certificate of appealability is improper.

15 **CONCLUSION AND ORDER**

16 For the reasons discussed above, this Court DENIES Mr. Buenrostro's section 2255 relief and
17 a certificate of appealability. The clerk is directed to close Case No. CV F 08-1654.

18 IT IS SO ORDERED.

19 **Dated: November 10, 2008**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE